Supreme Court, U.S.
FILED
OCT 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 88-1685

In the

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC., RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR MANVILLE CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

LAWRENCE S. FALTER
Associate Corporate Counsel
Manville Corporation
717 Seventeenth Street
Denver, Colorado 80217

WILLIAM J. RODGERS
(Counsel of Record)
THOMAS G. OLP
ROSS & HARDIES
888 16th St., N.W.
Washington, D.C. 20006
(202) 296-8600
Attorneys for Amicus Curiae

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

42 pp

QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

TABLE OF CONTENTS

Consent of the Parties 1

Interest of Manville Corporation Statement 1

Statement 2

Summary of Argument 4

Argument: 7

The Board's Application Of Its So-Called No–Presumption Rule Is Irrational And Emasculates The Good Faith Doubt Rule By Imposing An Improper Burden Of Proof And By Unfairly Evaluating Circumstantial Evidence Of Union Non-Support 7

A. An Employer May Nearly Always Infer That Striker Replacements Disfavor Representation By The Striking Union 7

B. The Board Applies Its So-Called No-Presumption Rule As A Presumption Of Replacements' Non--Opposition To The Union, Disallowing Any Inference Of Replacements' Non-Support Absent Proof Of Their Actual Opposition To Representation By The Union 15

C. The Board's Assumption That No Replacement Employees Oppose Representation By The Union Is Irrational 18

D. The Board's No-Presumption Rule Departs From The Good Faith Doubt Rule Without Explanation or Justification 19

1. The No-Presumption Rule Requires Proof Of The Union's Actual Minority Status Thus Eliminating The "Doubt" Prong Of The Good Faith Doubt Rule 19

2. The No-Presumption Rule Imposes An Unwarranted Burden Of Proof On The Employer 21

3. The Board's No-Presumption Rule Precludes A Fair Evaluation Of The Cumulative Effect Of Circumstantial Evidence Bearing On The Issue Of The Union's Continuing Majority Status 24

4. The Board's Decision Is Not Entitled To Deference Because The Board Neither Explained Nor Justified Its Departure From Long Standing Precedent 27

E. The Fifth Circuit Correctly Assessed The Totality Of Facts And Circumstances Showing The Employer's Reasonable Good Faith Doubt Of The Union's Majority 29

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Accurate Die Casting Co., 292 N.L.R.B. No. 106 (1989) 16

Airport Aviation Service, Inc., 292 N.L.R.B. No. 87 (1989) 16

Arkay Packaging Corporation, 227 N.L.R.B. 397 (1976) 12, 14

Atcheson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) 27

Atwood & Morrill Co., 289 N.L.R.B. No. 100 (988) 16

Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974) 20, 21, 23, 29

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 8

Bellwood General Hospital, Inc. v. NLRB, 627 F.2d 98 (7th Cir. 1980) 8, 24

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 18

Bickerstaff Clay Products Company, Inc. v. NLRB, 871 F.2d 980 (11th Cir. 1989) . . . . . *passim*

Bickerstaff Clay Products Co., 286 N.L.R.B. No. 27 (1987) 16

Bil-Mar Foods, Inc., 286 N.L.R.B. No. 84 (1987) . . . 16

Bolton-Emerson, Inc., 293 N.L.R.B. No. 139 (1989) 16, 21

Brooks v. NLRB, 348 U.S. 96 (1954) 20

Buckley Broadcasting Corp., Local 51 (Station KKHI, 284 N.L.R.B. No. 113 (1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) . . . . . *passim*

Celanese Corporation of America, 95 N.L.R.B. 664 (1951) . . . . . *passim*

Christopher Street Owners Corp., 286 N.L.R.B. No. 22 (1987) 16

Colonna's Shipyard, Inc., 293 N.L.R.B. No. 15 (1989) 16

Cook Bros. Enterprises, Inc., 288 N.L.R.B. No. 46 (1988) 16

Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362 (5th Cir. 1988) 14

Curtin Matheson Scientific, Inc., 287 N.L.R.B. No. 35 15

Cutten Supermarket, 220 N.L.R.B. 507 (1975) 12

Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center v. NLRB, 566 F.2d 77 (9th Cir. 1977) 24, 26

Department Store Food Corp. of Pennsylvania v. NLRB, 415 F.2d 74 (3d Cir. 1969) 27

Destileria Serralles, Inc., 289 N.L.R.B. No. 10 (1988), *enforced*, 1989 U.S. App. Lexis 12221 (1st Cir. 1989) 16

Dold Foods, Inc., 289 N.L.R.B. No. 156 (1988) 16, 17

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 20

Glover Bottled Gas Corp., 292 N.L.R.B. No. 99 (1989) 16

Hajoca Corp., 291 N.L.R.B. No. 16 (1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989) 16, 29

Holland Livestock Ranch v. United States, 543 F.Supp. 158 (D.Nev. 1982), *aff'd* 714 F.2d 90 (9th Cir. 1983) 19

In re Rawson Food Service, Inc., 846 F.2d 1343 (llth Cir. 1988) 24

International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) 29

J & J Drainage Products Co., 269 N.L.R.B. 1163 (1984) 21

Jackson Mfg. Co., 129 N.L.R.B. 460 (1960) 12

Johns-Manville Sales Corporation, 289 N.L.R.B. No. 40 (1988) 9, 16, 17, 27

Keeler Brass Company v. Continental Brass Company, 862 F.2d 1063 (4th Cir. 1988) 22, 24

KEZI, Inc., 286 N.L.R.B. No. 135 (1987) 17

Laystrom Manufacturing Co., 151 N.L.R.B. 1482 (1965) 21

Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862 (D.C.Cir. 1978) 28

Maphis Chapman Corp. v. NLRB, 368 F.2d 298 (4th Cir. 1966) 23

National Car Rental System, Inc., 594 F.2d 1203 (8th Cir. 1979) 20

National Cash Register Company v. NLRB, 494 F.2d 189 (8th Cir. 1974) 20, 24

NLRB v. Alvin J. Bart & Co., Inc., 598 F.2d 1267 (2d Cir. 1979) 20

NLRB v. Clement Brothers Company, 407 F.2d 1027 (6th Cir. 1969) 27

NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979) 18, 27

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 20

NLRB v. Dayton Motels, Inc., 474 F.2d 328 (6th Cir. 1973) 23

NLRB v. Gulfmont Hotel, 362 F.2d 588 (5th Cir. 1966) 20

NLRB v. International Union of Operating Engineers, Local 925, 460 F.2d 589 (5th Cir. 1972) 27

NLRB v. Massachusetts Machine And Stamping, Inc. 578 F.2d 15 (lst Cir. 1978) 20

NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978) . . . . . *passim*

NLRB v. Roger's IGA, Inc., 605 F.2d 1164 (lOth Cir. 1979) 20

NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1985) 8, 24

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 23

NLRB v. Wallkill Valley General Hospital, 866 F.2d 632 (3d Cir. 1989) 20

NLRB v. Windham Community Memorial Hospital, 577 F.2d 805 (2d Cir. 1978) 20

Orion Corporation v. NLRB, 515 F.2d 81 (7th Cir. 1975) 20

Paper Board Cores, Inc., 292 N.L.R.B. 107 1989) 16

Pennco, 250 N.L.R.B. 716 (1980), *enforced* 684 F.2d 340 (6th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982) 18

Pennex Aluminum Corp., 288 N.L.R.B. No. 53 (1988), *enforced without op.*, 869 F.2d 590 (3d Cir. 1989) 17

Peoples Gas System, Inc., 214 N.L.R.B. 944 (1974) 12, 21

Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) 20

Pilgrim Industries, Inc., 286 N.L.R.B. No. 21 (1987) 17

Powell Electrical Manufacturing Co., 287 N.L.R.B. No. 100 (1987) 17

Presbyterian St. Luke's Medical Center v. NLRB, 653 F.2d 450 (lOth Cir. 1981) 22

Price Waterhouse v. Hopkins, U.S., 109 S.Ct. 1775 (1989) 21

Proxy Communications, 290 N.L.R.B. No. 68 (1988), *enforced*, 873 F.2d 552 (2d Cir. 1989) 17

Republic Aviation Corp. v. NLRB, 324 U.S. 793, (1945) 18

Robinson Bus Service, Inc., 292 N.L.R.B. No. 20 (1988) 17

Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) 24

S & M Manufacturing Co., 172 N.L.R.B. 1008 (1968) 12, 14

Shaw's Supermarkets v. NLRB, 884 F.2d 34 (lst Cir. 1989) 27

Sofco, Inc., 268 N.L.R.B. No. 15 (1983) 21

Soule Glass And Glazing Co. v. NLRB, 652 F.2d 1055 (lst Cir. 1981) 19, 25

Star Manufacturing Company v. NLRB, 536 F.2d 1192 (7th Cir. 1976) 20

Sterling Processing Corp., 291 N.L.R.B. No. 30 (1988) 17

Stoner Rubber Co., 123 N.L.R.B 1440 (1959) 12, 20, 29

Teamsters Local Union 769 v. NLRB, 532 F.2d 1385 (D.C. Cir. 1976) 12

Terrell Machine Co. v. NLRB, 427 F.2d 1088 (4th Cir. 1970), *cert. denied* 398 U.S. 929 (1970) 20

Titan Metal Mfg. Co., 135 N.L.R.B. 196 (1962) 12, 13

Tile, Terrazzo & Marble Contractors Assoc., 287 N.L.R.B. No. 79 (1987) 17

Trans World Airlines v. Independent Federation of Flight Attendants, __U.S.__, 109 S.Ct. 1225, (1989) 8

Tube Craft, Inc., 289 N.L.R.B. No. 122 (1988) 17

United Scenic Artists, Local 829 v. NLRB, 762 F.2d 1027 (D.C. Cir. 1985) 19

United States Gypsum, 157 N.L.R.B. 652 (1966) . . . 29

United Supermarkets, Inc., 287 N.L.R.B. No. 11 (1987) 17

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 27

Valley Kitchens, Inc., 287 N.L.R.B. No. 69 (1987) 17

W.A.D. Rentals, Ltd. 289 N.L.R.B. No.9 (1988) . . . 17

Wallkill Valley General Hospital, 288 N.L.R.B. No. 18 (1988), *enforced*, 866 F.2d 632 (8th Cir 1989) . . 17

Wells Fargo Armored Service Corp., 290 N.L.R.B. No. 101 (1988) 17

Wells Fargo Armored Service Corp., 290 N.L.R.B. No. 106 (1988) 17

Wells Fargo Armored Service Corp., 290 N.L.R.B. No. 110 (1988) 17

Whisper Soft Mills, Inc. v. N.L.R.B., 754 F.2d 1381 (9th Cir. 1984) 9, 20

Windham Community Memorial Hospital, 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978) 12

Constitution, statutes and regulation:

Labor Management Relations Act, 1947, 29 U.S.C. §159(c)(3) (1989) 10

29 U.S.C. §160(c) 23

29 U.S.C. §158(a)(5) 23

29 U.S.C. §160(e) 27

Fed. R. Evid. 301 21

29 C.F.R. §101.10(b)(1982) 23

Miscellaneous:

Advisory Committee Note to Fed. R. Evid. 401 . . . 25

105 Cong. Rec. S5746 (daily ed. April 21, 1959) . . . 11

Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574 (1956) 25

Flynn, J., *The Economic Strike Bar: Looking Beyond The "Union Sentiments" of Permanent Replacements*, 61 Temple Law Review 691 (1988) 9

R. Gorman, *Labor Law* 112 (1976) 13

B. Ruth Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election*, 42 Industrial and Labor Relations Review, 262 (1989) 11

McCormick on Evidence 542-543 (3d Ed. 1984) . . . 24

McCormick on Evidence § 340 (3d Ed. 1984) 22

Morgan, *Basic Problems of Evidence* 32 (1962) 8, 18

Note, *The Strikers' Replacements Presumption And An Employer's Duty To Bargain With The Incumbent Union*, 21 Boston College Law Review, 455 (1980) 10

Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351 (1984) 9

1 Weinstein & Berger, *Weinstein's Evidence* ¶300[01] n.3, (1980) 8, 18

1A Wigmore, *Evidence* §§ 30, 37.4, pp.984-986, 1033 (Tillers rev. 1983) 8

1A Wigmore, *Evidence* §31 n.2 (Tillers rev. 1983) . . 14

1A Wigmore, *Evidence* §32 n.1 (Tillers rev. 1983) . . . 27

No. 88-1685

In the

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MANVILLE CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF MANVILLE CORPORATION

On July 22, 1988 Manville Corporation petitioned the Tenth Circuit for review, currently pending, of an NLRB decision and order (289 N.L.R.B. No. 40 (1988)), Docket No. 88-2134. The case presents similar issues, and related but not identical facts to those being considered by the Court here. Manville Corporation's interest is to describe the Board's application of its no-presumption rule in factual

contexts other than presented in the case under review in order to assist the Court to fully understand the Board's no-presumption rule as applied.

STATEMENT

On May 25, 1979 Local 968, General Drivers, Warehousemen and Helpers, representing Curtin Matheson's 27 warehouse employees, rejected Curtin Matheson's final contract offer. To force the Union's acquiescence, Curtin Matheson lawfully locked out its employees on June 4 for approximately one week. On June 12 it ended the lockout and renewed its May 25 offer. The Union again rejected it and called the 27 employees out on strike. Immediately five unit employees crossed the picket line to return to work. On June 17 Curtin Matheson implemented the wage increase in its final offer and on June 25 hired 29 permanent replacement employees. The Union continued striking until July 16 when it capitulated. It unconditionally ended the strike and accepted Curtin Matheson's May 25 offer. On July 19 it asked for immediate execution of a contract. On July 20 Curtin Matheson refused and withdrew recognition, saying it doubted the Union's continued majority support. Pet. App. 2a-4a.

The bargaining unit on July 20 consisted of 49 employees, 19 strikers (two had quit), 25 replacements (four had quit), and five crossovers.

Curtin Matheson's evidence supporting its claim of good faith doubt consisted of these credited facts:

1. Permanent replacements comprised a majority (25 of 49) of the bargaining unit. None of the employees indicated their support of the Union, the Union never contacted them, and they crossed the Union picket line every day to come to work.

2. Five additional employees (crossovers) rejected the strike and returned to work. Two of them, Tony Lopez and Bill Lee, who had never been Union members, told Director of Employee Relations Elizabeth Price that they did not support the Union.

3. On June 19 striker and Chief Shop Steward and negotiating committee member Shady Goodson told Ms. Price and Jim Crocker, another management official, that he was in an uncomfortable position because only the Union, not the employees, wanted the strike, and that other strikers felt the same way. He said he was having a tough time convincing strikers to maintain the picket line. Afterward he requested reinstatement, and later (on July 19) resigned.

4. On June 27 (two days after replacements were hired) striker and former shop steward J.R. Blackshire asked Ms. Price to be reinstated. He said he was angry at the Union and later, after speaking with other employees who were working, said that there was no Union anymore, that people were not supporting it, and that other striking employees wanted to return to work.

5. In early July striker Clint Waller crossed the picket line and told Ms. Price and Mr. Crocker that he had not been picketing because he was upset with the Union and intended to resign from membership. He later did so.

6. On July 12 striker Raymond Brunner crossed the picket line and told Price that he intended to retire because he did not want to have anything to do with the Union again.

7. On July 19 replacement David Schneider told Price he didn't think the Union represented the employees or was needed.

The administrative law judge found that Curtin Matheson possessed a reasonable basis for doubting the Union's majority. The Board rejected this ruling, holding that Curtin Matheson could not legitimately infer that the crossovers

repudiated the Union or that replacements did not support it. It held that Shady Goodson's statement could not be construed as a repudiation of the Union; and that the statements by other identified employees were individual expressions unreflective of other employees' views, and at most could support an inference that six employees opposed the Union. Pet. App. 25a-54a.

The Fifth Circuit granted Curtin Matheson's petition for review and denied enforcement of the Board's order. Pet. App. la-24a. It noted that over eighty percent of the bargaining unit was replaced on June 25, 1979, the replacements crossed a picket line each day to come to work, and the Union never sought to contact them. At least one replacement told the company that the Union did not represent the employees and was not needed. In view of this "context", it found the employer was justified in counting the striker replacements as doubtful supporters of the Union. The Court also observed that Chief Shop Steward and negotiating committee member Goodson's statement that the (striking) employees did not want the strike could be relied on as significant evidence of striking employees' lack of support for the Union.

SUMMARY OF ARGUMENT

The Board was correct in *Buckley Broadcasting Corp., Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) to repudiate its irrational presumption that striker replacements support the striking Union in the same ratio as strikers themselves and to announce that hence forth it would assess the Union sentiments of striker replacements without application of presumptions. But even in the absence of a presumption an employer may properly infer in most circumstances that replacement employees do not

favor representation by the striking Union. This inference is supported by experience and common sense, has been recognized by Congress and the courts, and was allowed by the Board in many cases before *Buckley Broadcasting* in which an employer's claimed reasonable, good faith doubt of the Union's majority status was assessed.

However, since *Buckley Broadcasting* the Board refuses to recognize the validity of this inference. It assumes that each striker replacement harbors no sentiment either for or against the Union unless and until the replacement's "actual[] oppos[ition]" to the Union (Pet. Br. 20) is established by the employer through evidence of expressed opposition. Circumstantial evidence of non-support is ignored. The Board in practice applies its so-called no-presumption rule as a presumption (of non-opposition to the Union), imposing upon the employer the same burden of proving replacements' actual opposition as it imposed under its repudiated presumption that replacements support the striking Union. The Fifth Circuit was correct to consider the rules as operationally equivalent.

The Board's assumption that striker replacements possess no sentiments disfavoring union representation is irrational. Moreover, the so-called no-presumption rule emasculates the long established and uniformly accepted good faith doubt rule. First, by definition the good faith doubt rule requires only proof of "doubt", not proof of a union's actual minority status. Yet, the Board applies its no-presumption rule by effectively requiring proof of the union's actual minority status before it recognizes the existence of good faith "doubt." This burden of proof is impermissible under the good faith doubt rule, Fed. R. Evid. 301, and the Board's statutory obligation to prove unfair labor practices by a preponderance of the evidence. Second, the good faith doubt rule, by its very nature, entails evaluation of the totality of direct and circumstantial evidence probative

of the union's loss of majority support. *Celanese Corporation of America*, 95 N.L.R.B. 664, 673 (1951). Yet, the no-presumption rule, because it requires direct evidence of employee expressions of union opposition, discounts circumstantial evidence of non-support, preventing a fair evaluation of probative circumstantial evidence supporting an employer's good faith doubt.

The Board failed to explain or to justify its departure from the good faith doubt rule, which for almost forty years has instructed the Board's and courts' assessment of the lawfulness of an employer's withdrawal of recognition from a perceived minority union. The Court thus owes the Board's decision no deference. Moreover, the policy reasons the Board cites do not support its step. The Board cites no empirical basis, and there is none, justifying a conclusion that the traditional good faith doubt rule upsets bargaining stability by encouraging employers to unseat unions through the hiring of striker replacements. In fact, employers generally choose replacement of employees as a last resort. The Board's argument that application of the good faith doubt rule impinges on employees' right to strike is overstated. Properly understood, establishing good faith doubt simply shifts the burden of producing evidence of the Union's majority back to the Board and Union, which are in a better position than the employer to prove it. The Board's policy arguments also ignore the statutory prohibition against an employer bargaining with a minority union.

The Fifth Circuit correctly rejected the Board's no-presumption policy. The lower court's analysis, consistent with the good faith doubt rule, fairly assessed the record facts and, unlike the Board, allowed valid inferences from the evidence. Its holding that Curtin Matheson possessed good faith doubt of the incumbent Union was undoubtedly correct. But even if the Court disagrees with the lower court's factual findings, it should remand to the Board for reassessment under the correct legal standard, permitting natural inferences to be drawn from the facts, requiring a showing short of proof of the Union's actual minority, and fairly evaluating the cumulative effect of all facts and circumstances on the issue of the Union's continuing majority.

ARGUMENT

THE BOARD'S APPLICATION OF ITS SO-CALLED NO-PRESUMPTION RULE IS IRRATIONAL AND EMASCULATES THE GOOD FAITH DOUBT RULE BY IMPOSING AN IMPROPER BURDEN OF PROOF AND BY UNFAIRLY EVALUATING CIRCUMSTANTIAL EVIDENCE OF UNION NON-SUPPORT.

A. An Employer May Nearly Always Infer That Striker Replacements Disfavor Representation By The Striking Union.

The Board in *Buckley Broadcasting Corp., Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) correctly repudiated a presumption approach to assessment of the union sentiments of striker replacements. It is empirically irrational to mandate an assumption that striker replacements support the striking union irrespective of surrounding facts. Since, as the Board notes, it is at least conceivable that a replacement may desire representation by the striking union, a presumption of opposition is also improper.

But an inference may be proper even where a presumption is eschewed. Inferences and presumptions are conceptually distinct: "[i]n the case of an inference, the existence of B *may be deduced* from A by the ordinary rules of reasoning and logic; in the case of a presumption, the existence of B *must initially be assumed* because of a rule of law." (foot-

notes omitted, emphasis in original) 1 Weinstein & Berger, *Weinstein's Evidence* ¶ 300[01] n.3, (1980), quoting Morgan, *Basic Problems of Evidence* 32 (1962). Determination of an employer's reasonable, good faith doubt essentially is an inferential process, as the Board noted in *Celanese Corporation of America*, 95 N.L.R.B. at 673 almost forty years ago:

> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case.

See also NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 305 (9th Cir. 1985) ("In gauging union support, the employer is often without direct evidence of minority status, and therefore he may properly rely on reasonable inferences from the available information.") Indeed, all judicial proof is essentially inductive, involving permissible inferences from proven facts. lA Wigmore, Evidence §§ 30, 37.4 pp. 984-986, 1033 (Tillers rev. 1983).

An inference that striker replacements disfavor representation by the striking union is almost always permissible and often compelling. The striking union virtually always will try to advance strikers' interests at the expense of replacement "scabs", and replacements are typically aware of this. *Buckley Broadcasting*, 284 N.L.R.B. No. 113 slip op. at 16. It commonly will try to force the employer to expel replacement workers in a strike settlement to recapture strikers' jobs. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491 (983) (union ousted replacements in strike settlement); *Trans World Airlines v. Independent Federation of Flight Attendants*, ___ U.S.___, 109 S.Ct. 1225, 1233 (1989) ("employer and union in many circumstances may reach a back-to-work agreement that would displace crossovers and new hires..."); *NLRB v.*

Randle-Eastern Ambulance Service, Inc., 584 F.2d 720, 724 (5th Cir. 1978) (union demanded that replacements be terminated); *Johns Manville Sales Corporation*, 289 N.L.R.B. No. 40 (1988), petition for review pending, No. 88-2134 (l0th Cir. filed July 22, 1988), slip op. at 12 (same). After the strike is over, assuming replacements have not been displaced, the union will continue to oppose replacements' interests. Each of the post-strike issues as to which Petitioner asserts (Pet. Br. 26 n.17) a union could play an instrumental role in resolving would be won by the union directly at the expense of replacement employees.

It therefore is widely recognized that striker replacements in all probability oppose representation by the striking union. *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) (union demand to reinstate all strikers as condition of strike settlement justified assumption that replacements opposed union representation); *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980, 992 (llth Cir. 1989) ("Common sense dictates that it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day."); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351, 390 (1984) ("The employees hired as permanent replacements, on the other hand, are likely to be hostile to the union, if only because the union will insist that they be dismissed in favor of the strikers as a condition to any settlement."); Flynn, J., *The Economic Strike Bar: Looking Beyond The "Union Sentiments" of Permanent Replacements*, 61 Temple Law Review 691, 705 (1988) ("Knowing that the union may well be negotiating for their ouster, replacements are likely to oppose the union out of the simple desire to hold on to their positions."). A recent reviewer observed:

> [T]he connection between the strikers' replacements and the conclusion that they do not support the union is so strong that a presumption is not necessary. Instead, all that is required is the same type of permissible inference that is characteristic of all circumstantial evidence. Therefore, the existence of permanent strikers' replacements is consistent with the characteristics of objective evidence necessary to prove a good faith doubt. Indeed, the use of strikers' replacements as objective evidence is supported by the Board's consistent use of similar inferential assumptions to rebut the continuing majority support presumption. Among these are the admission of lack of majority status by the bargaining representatives; a decline in the number of union dues check off authorizations; lack of incumbent union activity; oral statements of employees, particularly when numerous and reliable; written repudiations of the union by the employees; the history of employer-union relations; and, the employees' filing of decertification petitions. Although these grounds have not always been held to be sufficient proof of loss of majority support, either by themselves or cumulatively, the Board has consistently allowed them to be considered in determining the reasonableness of an employer's doubt.

Note, *The Strikers' Replacements Presumption And An Employer's Duty to Bargain With The Incumbent Union*, 21 Boston College Law Review, 455, 472-473 (1980).

Congress also recognized the validity of an inference that replacements oppose the striking union. At least in part the recognition led it in 1959 to amend section 9(c)(3) of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(c)(3), to permit replaced strikers to vote in a representation election held within twelve months of the commencement of the strike. Congress recognized that replacement workers would inevitably vote out the striking union in an election in which only they voted. *See* remarks of Senate Sponsor John Kennedy describing then existing law at 105 Cong. Rec. S5746 (daily ed. April 21, 1959) ("...if a representational election is held the union loses, because it is not likely that the replacement workers will vote for the union.").

Available empirical studies also support the validity of an inference that replacements as a whole disfavor union representation. It is well recognized that norms influence an employee's support or opposition to a union. *See* B. Ruth Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election*, 42 Industrial and Labor Relations Review, 262, 263 (1989), and studies cited therein. The empirical basis for the Board's assumption that *new* employees support the incumbent union is derived from the observation that new employees hired into an organized plant generally accept the status quo. However, where all union employees are replaced in a fell swoop, the union norm no longer exists. Not only is the old norm abolished, a new norm polarized against the striking union is established, supporting the inference that the workforce as a whole disfavors representation by the striking union. The Fifth Circuit recognized this in the case under review, observing that:

> [o]ver eighty percent of the bargaining unit work force (twenty-two of twenty-seven employees) was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union.

859 F.2d at 367. Available empirical knowledge of probable replacement employee union sentiments solidly supports the court's observation, not as a presumption, but as a permissible evidentiary inference.

The Board itself refrained from applying presumptions in assessing Union sentiments of striker replacements prior to adopting its ill-fated presumption approach in *Cutten Supermarket*, 220 N.L.R.B. 507, 509 (1975), and *Windham Community Memorial Hospital*, 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978). *Buckley Broadcasting*, 284 N.L.R.B. No. 113, slip op ... 8. Rather, it accepted inferences of replacements' union nonsupport when warranted by the evidence. *See S & M Manufacturing Co.*, 172 N.L.R.B. 1008, 1008-09 (1968) ("As the only employees then working were ... newly hired employees who had crossed the picket line to go to work and who are not shown to have manifested their support of the Union, it cannot be found that there were any Union adherents among the employees working..."); *Arkay Packaging Corporation*, 227 N.L.R.B. 397, 397-398 (1976) ("no evidence demonstrating Union support of replacements"); *Stoner Rubber Company, Inc.*, 123 N.L.R.B 1440, 1444 (1959) (not "unreasonable [for employer] to assume that none of [its] permanent replacements were union adherents"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("most improbable" that replacements "had chosen the Union to represent [them]"); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) ("no evidence that any of the replacements had authorized the Union to represent them."); *Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 947 (1974), *reversed and remanded on other grounds sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1391 (D.C.Cir. 1976) ("While it is of course possible that the replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation, it was not unreasonable for Respondent to infer

that the degree of union support among those employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf of Union-sponsored objectives.").

Professor Gorman, whose "presumption" gave rise to this case, did not advocate application of a technical presumption when he reported the Board's practice.[1] Nor was Gorman's text so viewed by the courts. The first court to quote the language, *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d at 729, actually held that:

> the Company *made permissible inferences from solid evidence* - the number of returning strikers, the Union resignations, *the number of replacements*, and the Union representative's remark - which in our view were sufficient to support a reasonable doubt of the Union's continued majority status ... The Board's determination otherwise rested on presumptions we consider inapplicable, [and] on the *rejection of inferences we consider permissible* ....

584 F.2d at 729 (emphasis added). *See also, Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d at 991 ("While the court [in *NLRB v. Randle-Eastern Ambulance Service, Inc.*,] did approvingly cite to Professor Gorman's treatise, its decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of the striker replacements to make room for the strikers. The existence

[1] "[I]f a new hire agrees to serve as a replacement for a striker, in union parlance, a strike breaker, (or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority. When such strikebreakers or permanent replacements constitute a majority of the unit, the presumption of union majority is undermined. *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196 (1962). R. Gorman, *Labor Law* 112 (1976).

of picket line violence with respect to striker replacements was also a factor which strengthened the Company's doubt that those employees support the Union."). Even the Fifth Circuit in *Curtin Matheson*, while adverting to the "Gorman presumption", 859 F.2d at 367, specifically held that "the Company was justified in doubting that the striker replacements supported the Union *in this context.*" *Ibid* (emphasis added). The court's decision thus reveals its recognition that the employer's doubt of the Union's majority status arose from a factually permissible inference, not from the mandate of a presumption.

The Board's valid argument that a *presumption* of replacements' opposition to the union is improper because it is conceivable that a replacement might desire representation by the striking union does not similarly illegitimize an *inference* that replacements likely do not favor the striking Union. Legal factfinding is routinely confronted with alternative hypotheses afforded by the facts, and the relevant question is which among possible hypotheses possesses the requisite degree of probability. 1A Wigmore, *Evidence* § 31 n.2 (Tillers rev. 1983). Thus, the bare possibility that a replacement might desire representation by the striking Union is not argument for disallowing an inference of replacements' probable non-support where the facts fairly permit it.

Still, the inference of union non-support being a factual one, it follows that facts showing actual Union support must weaken or even extinguish it. *Cf. S & M Manufacturing Co.*, 172 N.L.R.B. at 1008-09 (Board noted that no evidence was presented tending to show replacements' Union support); *Arkay Packaging Corporation*, 227 N.L.R.B. at 397-398 (same). Conversely, evidence that replacements are subjected to violent attack by strikers or that the union actively campaigns against their interests at the bargaining table or elsewhere, logically strengthens the inference of non-support. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d at 724; *Bickerstaff Clay Products Company, Inc.*, 871 F.2d at 991. Whether the inference of non-support drawn from the hiring of replacements, together with inferences derived from other direct and circumstantial evidence, are sufficient to satisfy the employer's burden of proving reasonable good faith doubt depends on a weighing of the totality of the facts and circumstances against the applicable burden of proof. *Celanese Corporation of America*, 95 N.L.R.B. 664, 673 (1951). But until the Board adopted its presumption that replacements support the striking Union, the employer at least had been permitted to point to the hiring of replacements as evidence supporting its claimed good faith doubt. Despite its announced discontinued reliance on presumptions in *Buckley Broadcasting*, however, the Board continues to deny the relevance of such evidence.

B. The Board Applies Its So-Called No-Presumption Rule As A Presumption Of Replacements' Non-Opposition To The Union, Disallowing Any Inference Of Replacements' Non-Support Absent Proof Of Their Actual Opposition To Representation By The Union.

Under the guise of its so-called no-presumption rule the Board since *Buckley Broadcasting* assumes that no replacements harbor sentiments against representation by the Union. It permits an inference of a replacement's Union non-support only if the employer proves the replacement's actual opposition to the Union by direct evidence. Pet. Br. 20 ("[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status."). The Board's position is apparent from *Curtin Matheson* where it held (Pet. App. 33a):

> [i]n this case, the apparently peaceful picket line the replacements crossed and the Union's apparent failure to contact them during the strike do not provide a basis for inferring their union sentiments, as these matters are 'common to the hiring of replacements.' [citing *Buckley Broadcasting*].

Further, the Board insists on evidence of a replacement's *expressed* opposition to the Union as a condition of allowing an inference of that employee's Union non-support. *See Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40, slip op. at 9 (Board "will review each case on its facts considering whether the employer has proffered evidence of employees' *expressed* desires to repudiate the union sufficient to overcome the overall presumption of continuing union majority." (emphasis supplied)). The Board in practice does not recognize circumstantial evidence of union non-support. Only in cases where the employer has proved that a majority of the bargaining unit either signed a decertification petition or otherwise unequivocally stated opposition to union representation has the Board permitted it to withdraw recognition.[2] In all other cases it has rejected as insufficient the employer's proffered evidence of good faith doubt, of whatever quantum or nature.[3] Thus, while the Board in

[2] *Airport Aviation Service, Inc.*, 292 N.L.R.B. No. 87 (1989); *Atwood & Morrill Co.*, 289 N.L.R.B. No. 100 (1988); *Bil-Mar Foods, Inc.*, 286 N.L.R.B. No. 84 (1987); and *Paper Board Cores, Inc.*, 292 N.L.R.B. No. 107 (1989).

[3] *Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (1989); *Bickerstaff Clay Products Co.*, 286 N.L.R.B. No. 27 (1987), *enforcement denied*, 871 F.2d 980 (llth Cir. 1989); *Bolton-Emerson, Inc.*, 293 N.L.R.B. No. 139 (1989); *Christopher Street Owners Corp.*, 286 N.L.R.B. No. 22 (1987); *Colonna's Shipyard, Inc.*, 293 N.L.R.B. No. 15 (1989); *Cook Bros. Enterprises, Inc.*, 288 N.L.R.B. No. 46 (1988); *Destileria Serralles, Inc.*, 289 N.L.R.B. No. 10 (1988), *enforced*, 1989 U.S.App.Lexis 12221 (lst Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (1988); *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (1988), petition for review pending, No. 88-2134 (10th Cir. filed July 22, 1988); *KEZI, Inc.*, 286 N.L.R.B. No. 135 (1987); *Pennex Aluminum Corp.*, 288 N.L.R.B. No. 53 (1988), *enforced without op.*, 869 F.2d 590 (3d Cir. 1989); *Pilgrim Industries, Inc.*, 286 N.L.R.B. No. 21 (1987); *Powell Electrical Manufacturing Co.*, 287 N.L.R.B. No. 100 (1987); *Proxy Communications*, 290 N.L.R.B. No. 68 (1988), *enforced*, 873 F.2d 552 (2d Cir 1989); *Robinson Bus Service, Inc.*, 292 N.L.R.B. No. 20 (1988); *Sterling Processing Corp.*, 291 N.L.R.B. No. 30 (1988); *Tile, Terrazzo & Marble Contractors Assoc.*, 287 N.L.R.B. No. 79 (1987); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (1988); *United Supermarkets, Inc.*, 287 N.L.R.B. No. 11 (1987); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (1987); *W.A.D. Rentals, Ltd.*, 289 N.L.R.B. No. 9 (1988); *Wallkill Valley General Hospital*, 288 N.L.R.B. No. 18 (1988), *enforced*, 866 F.2d 632 (8th Cir. 1989); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 101 (1988); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 106 (1988); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 110 (1988).

Curtin Matheson implied that evidence of picket line violence or direct negotiations by the union to oust replacements as a condition of a strike settlement might have altered its finding (Pet. App. 3a n.l), it did not make a difference in the Board's decision when the record contained such evidence. *Johns Manville Sales Corporation*, 289 N.L.R.B. No. 40, *Bickerstaff Clay Products Co.*, 286 N.L.R.B. No. 27 (1987), *enforcement denied*, 871 F.2d 980 (llth Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (1988). Moreover, if expressions of union opposition fall short of being made by a majority of the bargaining unit, good faith doubt will not be found, regardless of the amount of additional circumstantial evidence. *Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40 (evidence of pervasive strike violence and bargaining table demands to oust the replacements held insufficient since "more reliable factors, including the list for the decertification petition and the statements from identified employees" could have indicated, but did not indicate, "more tangibly majority employee dissatisfaction with the Union...") *Id.* , slip op. at 11-12.

The post-*Buckley Broadcasting* cases reveal that the Board has applied its so-called no-presumption rule in practice as a presumption of every replacement's non-opposition to the union.[4] The condition to be satisfied to overcome the presumption is proof of each replacement's expressed or articulated opposition to the Union. The burden of proof imposed on the employer by the no-presumption rule is identical to the burden imposed by the Board's repudiated presumption that replacements support the striking union: proof of each replacement's actual opposition to the Union. *See Pennco*, 250 N.L.R.B. 716, 718 (1980), *enforced* 684 F.2d 340 (6th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982) (employer must produce evidence that replacements "who crossed the picket line, in fact, did not support the union.") The Fifth Circuit was correct to observe no operational difference between the Board's presumption of replacements' union support and its effective presumption of their non-opposition to the Union under the guise of its no-presumption rule.

C. The Board's Assumption That No Replacement Employee Opposes Representation By The Union Is Irrational.

Board inferences and presumptions are enforceable only if there exists "rationality between what is proved and what is inferred." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-805 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 493 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) ("It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts.")

[4] A presumption, properly understood, is "a procedural rule which requires the existence of fact B (presumed fact) to be assumed when fact A (basic fact) is established unless and until a certain specified condition is fulfilled." 1 Weinstein & Berger, *Weinstein's Evidence* ¶ 300[01] n.3, (1980), quoting Morgan, *Basic Problems of Evidence* 32 (1962).

"Where such a nexus is lacking, the presumption is invalid." *United Scenic Artists, Local 829, v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985). Policy alone is not an adequate basis for an agency's presumptions. *Id.*

The Board's no-presumption policy is irrational in this case because it assumes the existence of a fact of which there is no evidence. *See, Holland Livestock Ranch v. United States,* 543 F.Supp. 158 (D.Nev. 1982), *aff'd*, 714 F.2d 90 (9th Cir. 1983) (Irrational to presume trespass of livestock on public land in absence of any evidence that such trespass has in fact occurred). Specifically, the Board assumes that no striker replacements oppose representation by the striking union, yet it can cite no evidence of its assumed fact; indeed, all record evidence suggests the contrary. The mere possibility that a replacement might cross a picket line and still support the striking union, the Board's only asserted empirical ground for its policy (Pet. Br. 17), is insufficient because a mere possibility cannot raise itself by its bootstraps to the level of fact, and this record contains no hint that *any* replacements actually desired representation by the Union. Consequently, the Board may not charge the employer with disproving a presumed fact of which there is no credible direct or circumstantial evidence in the first place. *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d at 1035 n.26.

D. The Board's No-Presumption Rule Departs From the Good Faith Doubt Rule Without Explanation Or Justification.

1. The No-Presumption Rule Requires Proof Of The Union's Actual Minority Status Thus Eliminating The "Doubt" Prong Of The Good Faith Doubt Rule.

The good faith doubt rule[5] requires a lesser showing than actual proof of the incumbent union's minority status in

[5] All courts of appeals have endorsed the two part good faith doubt rule. *See Soule Glass And Glazing Co. v. NLRB*, 652 F.2d 1055, 1109 (lst

order to rebut the overall presumption of the union's continuing majority. *Celanese Corporation of America*, 95 N.C.R.B. at 673. As the Board explained over thirty years ago in *Stoner Rubber Company, Inc.*:

> An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.

123 N.L.R.B. at 1445.

Cir. 1981); *NLRB v. Massachusetts Machine And Stamping, Inc.*, 578 F.2d 15, 18 (lst Cir. 1978); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978); *NLRB v. Alvin J. Bart & Co., Inc.*, 598 F.2d 1267, 1271 (2d Cir. 1979); *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632,636 (3d Cir. 1989); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *NLRB v. Gulfmont Hotel*, 362 F.2d 588 (5th Cir. 1966); *Automated Business Systems v. NLRB*, 497 F.2d 262, 270 (6th Cir. 1974); *Orion Corporation v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *Star Manufacturing Company v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976); *National Car Rental System, Inc.*, 594 F.2d 1203, 1205 (8th Cir. 1979); *National Cash Register Company v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d at 1387 (9th Cir. 1984); *NLRB v. Roger's IGA, Inc.*, 605 F.2d 1164, 1166 (lOth Cir. 1979); *Bickerstaff Clay Products Co., Inc. v. NLRB*, 871 F.2d at 985; *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980). The Board continues to apply it, and the Supreme Court has cited it approvingly in *Brooks v. NLRB*, 348 U.S. 96, 101 (1954); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987).

This principle is well established in Board and court decisions. *Laystrom Manufacturing Co.*, 151 N.L.R.B. 1482, 1483; *Sofco, Inc.*, 268 N.L.R.B. No. 15; *J & J Drainage Products Co.*, 269 N.L.R.B. 1163, 1171 (1984); *Automated Business Systems v. NLRB*, 497 F.2d 271 (6th Cir. 1974); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980); *Randle-Eastern Ambulance Service*, 584 F.2d at 728; *Bickerstaff Clay Products Co., Inc.*, 871 F.2d at 985.

Yet the Board's no-presumption rule, by requiring proof of each replacement's anti-union expressions before an inference of the replacement's union non-support is permitted, effectively conditions satisfaction of the good faith doubt standard on establishing the union's actual minority status. The no-presumption rule, as applied by the Board, effectively eliminates the good faith doubt prong of the *Celanese* test.

2. The No-Presumption Rule Imposes An Unwarranted Burden Of Proof On The Employer.

The Board's no-presumption rule fails to comport with Fed. R. Evid. 301, and with the Board's statutory obligation to establish the existence of an unfair labor practice by a preponderance of the evidence.

Fed. R. Evid. 301 provides that a presumption:

> imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Additionally, overcoming a presumption does not require production of "clear and convincing" evidence. *Price Waterhouse v. Hopkins*, ___U.S.___, 109 S. Ct. 1775, 1792 (1989). *See also, Bolton-Emerson, Inc.*, 293 N.L.R.B. No. 139 (1989), slip op. at 2 n.2 (Board's decisions do not require proof of

good faith doubt by "clear, cogent and convincing" evidence). Thus, as is usual in a civil case, the Board retains the ultimate burden of establishing "that the existence of the proposition to be proved is more probably true than not true." *Keeler Brass Company v. Continental Brass Company*, 862 F.2d 1063, 1066 (4th Cir. 1988); 29 U.S.C. § 160 (b) (Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States..."). The Board is required to comply with the mandate of Fed. R. Evid. 301. *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 456 (10th Cir. 1981).

The Board's application of its no-presumption rule oversteps its proof obligation under Fed.R. Evid. 301 because it effectively transfers to the employer the burden of persuasion on the issue of the union's majority status. It does so because the Board recognizes no quantum of direct and circumstantial evidence of the union's minority status to satisfy the employer's burden of proof save proof of the union's actual minority status. Otherwise stated, the employer has not met its burden of proof until the union's minority status is conclusively established. The Board also violates Fed.R. Evid. 301 by recognizing only evidence of union-opposing *expressions*. Essentially, the Board accepts only direct evidence as probative of union non-support, eschewing circumstantial evidence thereof as unreliable. By limiting proof to direct evidence of employee expressions the Board effectively has adopted a "clear and convincing" evidence standard prohibited by Fed. R. Evid. 301 and the Board's own precedents. *See McCormick on Evidence* § 340 (3d Ed. 1984) ("clear and convincing" standard requires persuasion that truth of contention is "highly probable").

The Board's statutory obligation to prove unfair labor practices likewise prohibits a shift to the employer of the burden of proving the Union's actual minority status. The

National Labor Relations Act, 29 U.S.C. §§151 *et. seq.*, requires the Board to bear the burden of establishing an unfair labor practice. "Section 10(c) of the Act, 29 U.S.C. § 160(c), expressly directs that violations may be adjudicated only 'upon the preponderance of the testimony' taken by the Board. The Board's rules also state that '[t]he Board's attorney has the burden of pro[ving] violations of Section 8.' 29 CFR § 101.10(b) (1982)." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

The Board can properly shift to the employer the burden of persuasion as to issues constituting an affirmative defense to a proven unfair labor practice. *See NLRB v. Transportation Management Corp.*, 462 U.S. at 401 (employer properly bears burden of persuasion of affirmative defense that employee would have been discharged regardless of unlawful motive where Board has already proved elements of unfair labor practice). However, an employer's burden to overcome the overall presumption of the Union's majority status is not akin to an affirmative defense. Section 8 (a)(5) of the Act in terms prohibits an employer's refusal to bargain with a *majority* representative of its employees. *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 303 (4th Cir. 1966) (failure to prove majority status relieves employer of any duty to bargain). Proof of majority is thus an element of the Board's affirmative case. *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973). While initially the Board may rely on a rebuttable presumption of the Union's continuing majority status to satisfy that element of its affirmative case, if the presumption is rebutted, the burden of proving actual majority shifts back to the Board, *Automated Business Systems v. NLRB*, 497 F.2d at 270 (6th Cir. 1974), and failure to prove majority defeats the Board's affirmative case. Since the employer's evidence of good faith doubt serves to defeat an element of the Board's case in chief, it is not in the nature of an affirmative defense. *See In*

re Rawson Food Service, Inc., 846 F.2d 1343, 1349 (llth Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense); *Keeler Brass Company*, 862 F.2d at 1066. Consequently, the Board may not lawfully shift to the employer the ultimate burden of persuasion on the issue of the Union's non-majority, as it seeks to do. Section 10(c) of the Act requires the burden of persuasion at all times to remain with the Board.

3. The Board's No-Presumption Rule Precludes A Fair Evaluation Of The Cumulative Effect Of Circumstantial Evidence Bearing On The Issue Of The Union's Continuing Majority Status.

The good faith doubt rule requires that the facts and circumstances indicative of the union's loss of majority be considered cumulatively. *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036 (8th Cir. 1976). In other words, even where a particular factor considered alone would be insufficient to support a good faith doubt of a union's majority status, the cumulative force of all of the factors may be adequate to support such a doubt. *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *National Cash Register Company v. NLRB*, 494 F.2d at 194; *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 305. This rule is but an application of the traditional evidentiary principle that a piece of evidence may not be enough by itself to prove a desired fact, but may be enough when considered along with all other relevant facts. *See McCormick on Evidence* 542-543 (3d Ed. 1984):

> An item of evidence, being but a single chain of proof, need not prove conclusively the proposition for which it is offered .... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence .... Thus, the common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall.

See also Advisory Committee's Note to Fed. R. Evid. 401 ("...[I]t is not to be supposed that every witness can make a home run." *quoting* Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 576 (1956), which itself quoted Professor McBaine.)

However, the Board's no-presumption rule precludes it from fairly evaluating circumstantial evidence of union non-support. The Court in *Bickerstaff Clay Products, Inc.*, noted this clearly:

> In determining whether an employer has sufficient objective evidence of loss of union support to justify withdrawal from bargaining, the cumulative effect of all of the evidence must be considered. [*Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982)] Generally, several indicia of loss of majority support are required and no one factor is determinative, i.e., striker replacements or union dormancy. *Soule Glass*, 652 F.2d at 110. We acknowledge that the above factors do not translate readily into a "precise numerical estimate" of the Union's strength, but this is not fatal to the Company's case. *Randle-Eastern*, 584 F.2d at 729. We emphasize that the Company need not have conclusive proof that the majority of employees do not support the Union, only sufficient "objective evidence to support a good faith doubt of majority

status." *Id.* In our view, the Board *has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company*. The Ninth Circuit, in reversing a Board order finding insufficient evidence in a good faith doubt case, has this criticism of the Board which is applicable to this case:

> The Board concluded that each fact considered separately did not give [the Company] reasonable grounds to doubt the union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.... The courts require an assessment of the cumulative force of the combination of factors [citations omitted]. Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate.
>
> *Golden State Rehabilitation Convalescent Center v. National Labor Relations Board*, 566 F.2d 77, 79-80 (9th Cir. 1977).

(emphasis added) 871 F.2d at 994. The Board's unfair evaluation of circumstantial evidence stems from its practical requirement, embodied in its no-presumption, that nothing save proof of the union's actual minority status will overcome the effective presumption of replacements' non-opposition to the Union. As the court in *Bickerstaff* recognized, the result is the Board's seriatim inspection of each piece of circumstantial evidence evincing Union non-support and its discarding of the evidence if insufficient by itself to prove "actual opposition." It does not consider whether the evidence in its totality establishes good faith doubt. This approach violates McCormick's "a brick is not a wall" observation, denying the efficacy of each piece of evidence for its failure in effect to "hit a home run." 1A Wigmore, *Evidence*

§§ 32 n.1 (Tillers rev. 1983). *See e.g. Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40. It also denies to employers inferences the Board itself routinely draws. *See NLRB v. Clement Brothers Company*, 407 F.2d 1027, 1029 (6th Cir. 1969) (Board allowed to infer that majority of bargaining unit had been unlawfully coerced by Union despite direct evidence showing only numerical minority suffered actual coercion); *Department Store Food Corp. of Pennsylvania v. NLRB*, 415 F.2d 74, 77 n.4 (3d Cir. 1969) ("appropriate for Board to consider numerical evidence as supportive of other permissible inferences"). The Board is required by statute fairly to weigh all direct and circumstantial evidence in the record as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951). Its failure to permit any inference of Union non-support from evidence of replacements' hiring and other circumstantial evidence of non-support violates this obligation, precluding the Court from finding that the Board's decision is supported by "substantial evidence on the record considered as a whole." Act, §10(e), 29 U.S.C. § 160(e); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 791.

4. The Board's Decision Is Not Entitled To Deference Because The Board Neither Explained Nor Justified Its Departure From Long Standing Precedent.

It is a fundamental principle of administrative law that an agency may not significantly depart from its own prior precedents without explicitly recognizing that it is doing so and explaining why. *Shaw's Supermarkets v. NLRB*, 884 F.2d 34 (lst Cir. 1989); *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972). As the Court in *Atcheson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808-09 (1973) cautioned, an agency has a:

> duty to explain its departure from prior norms. *Secretary of Agriculture v. United States* [347 U.S. 645, 653-54 (1954)] ... Whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate ..."

Absent such explanation, the agency's action is not entitled to deference. *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 871-72 (D.C. Cir. 1978).

The Board's practice since *Buckley Broadcasting* effectively jettisons its long standing "doubt" standard, accepted by all circuits and at least implicitly by the Court, in favor of a higher standard requiring proof of the Union's actual minority status. It behooves the Board to explain and to justify its departure from the good faith doubt rule, but the Board has not done so. It hasn't even officially acknowledged the effect of its no-presumption rule on the "doubt" component of the good faith doubt rule. Moreover, its policy arguments are directed against adoption of a presumption of replacements' Union opposition; they do not address why rejection of the good faith doubt rule as traditionally applied, a middle ground between two "presumption" extremes, is justified. For example, while the Board argues that a presumption of opposition would encourage employers to refrain from bargaining in good faith since they would know they could wipe out the Union by hiring replacements, it has not offered any argument or empirical evidence showing that the good faith doubt rule encouraged such conduct by employers. In fact, the Board cited no empirical evidence that replacement of employees occurs more commonly today than before.

The Board's argument that application of a presumption of replacements' union opposition would impinge on employees' right to strike is overstated when read against a traditional application of the good faith doubt rule. Properly understood, establishing good faith doubt simply rebuts the presumption of majority, shifting the burden of production of evidence of the union's majority back to the Board and union. *Automated Business Systems v. NLRB*, 497 F.2d at 270. It is not unfair to impose an evidentiary burden on the Board and union. They have more accurate intelligence of union supporters than the employer, *Stoner Rubber*, 123 N.L.R.B. at 1444, who cannot poll employees, or even ask for a Board election, without first marshalling evidence of union non-support sufficient to allow it to withdraw recognition. *Hajoca Corporation v. NLRB*, 872 F.2d 1169, 1176 (3d Cir. 1989) (Board requires "substantial, objective evidence" to justify poll); *United States Gypsum*, 157 N.L.R.B. 652 (1966) (employer must show objective considerations in seeking election).

The Board also neglected to analyze whether its no-presumption rule is as consistent as the traditional good faith doubt rule with an employer's prohibition on bargaining with a minority union. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961). In fact, its position, unlike the good faith doubt rule, will likely lead to entrenchment of minority unions. But the Board has no authority or discretion to adopt a rule that will result in that which the Labor Act prohibits. Since the Board has failed to explain or justify its departure from the good faith doubt rule, as traditionally applied, and the consequences its departure fairly entails, its decision cannot be accorded deference.

E. The Fifth Circuit Correctly Assessed The Totality Of Facts And Circumstances Showing The

Employer's Reasonable Good Faith Doubt Of The Union's Majority.

The Fifth Circuit correctly rejected the Board's no-presumption policy. The lower court, consistent with the good faith doubt rule, fairly assessed the record facts and, unlike the Board, permitted reasonable inferences from the evidence of the Union's loss of support. That evidence was countered with *no* evidence tending to show that replacements in fact supported Union representation. Under the circumstances, the lower court's holding that the employer possessed good faith doubt of the incumbent union's majority status was undoubtedly correct. But even if the Court disagrees with the lower court's factual findings, it should remand to the Board for a fair assessment under the good faith doubt standard, permitting natural inferences to be drawn from the facts, requiring a showing short of proof of the union's actual minority, and evaluating the cumulative effect of the totality of facts and circumstances bearing on the issue of the Union's continuing majority.

CONCLUSION

The judgment of the court of appeals should be affirmed, or in the alternative, remanded to the Board for a fair evaluation of the facts and circumstances.

Respectfully submitted.

LAWRENCE S. FALTER
Associate Corporate Counsel
Manville Corporation
717 Seventeenth Street
Denver, Colorado 80217

WILLIAM J. RODGERS
THOMAS G. OLP
ROSS & HARDIES
888 16th St., N.W.,
Washington, D.C.
20006-4103
(202) 296-8600

October 17, 1989